and philosophers and create a new order out of which minor incidents, such as the freedom of the seas, will naturally flow to aid mankind in his efforts for the only real peace, that which is based upon law and justice.

When we abandoned neutrality, we struck a great blow for the existence of law, not any particular law, but all law. We did not haggle about rules that lawyers had made as to ultimate destination and continuous voyage; the lawyers could wrangle about that forever. In the Civil War we took one view because it was to our interest and we sustained it by the action of lawyers before an arbitration board; we might do it again if proper counsel was retained. We recently took another view as to our relations as neutrals because our interest dictated something different. We did not do it with any real heart in it. We did not mean to fight over it. There was no necessity for doing so. We distinguished between mere rights that could be paid for in money and adjusted by a court, and the sacred rights of human life; those rights which ordinary people call "God-given rights" and scientists call by some other name but which means exactly the same thing.

FREEDOM OF THE SEAS[1]

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In this discussion "the freedom of the seas" will be considered in relation to the general subject of "America's obligations as the defender of international right," and will be treated as relating to the obligations of the United States, while a neutral in the present war, to defend international right in regard to the freedom of the seas.

It should be noted in passing that although the phrase "freedom of the seas" has played a prominent part in discussions relating to the essential conditions for an enduring peace, there has been no controversy in recent years about the freedom of the seas in time of peace. Under peace conditions in modern times all the waters of the earth, which, by reason of their geographical situation, can properly be regarded as parts of the high seas, have been free to

[1] Prepared before the United States entered the war.

the mercantile marine of all nations without discrimination or preference, and without restraint except against acts which, by universal custom and consent, are prohibited as unlawful.

It is a curious circumstance that the phrase "the freedom of the seas in time of war" is self-contradictory. In time of war the almost unlimited freedom of the seas enjoyed in time of peace is subjected to certain theoretically well-defined and universally recognized limitations and restraints. In so far as the vessels of belligerents are concerned, the freedom of the seas ceases to be a question of the right of law and becomes a question of the right of the strongest, subject always to the overruling restraint of the principles of humanity and civilization; and in so far as neutrals are concerned, their rights under peace conditions are seriously impaired in war time by the rights conferred upon belligerents under the laws of war, which impose extensive limitations upon neutral commerce and communications with the enemy.

The freedom of the seas for neutrals in time of war, therefore, means, from the belligerents' point of view, nothing more than the freedom permitted under the limitations imposed by the enforcement of belligerent rights, and conversely from the neutrals' point of view, it means immunity from belligerent interference beyond the limits which the rights of neutrals imposed upon the enforcement of the rights of belligerents.

It is well to bear in mind that the rights and interests of neutrals are not superior to or more privileged than the rights and interests of belligerents. Judging by experience in the present war, neutrals may expect to be treated by belligerents with no greater degree of consideration than is demanded by the exigencies of the situation. The policy which the United States has so long and consistently urged of making private property, except contraband, immune from capture at sea, would be a step in the right direction, but it is now evident that the exception of contraband would destroy the importance of this policy since practically everything destined to an enemy country is liable to be classed as contraband under the modern method of organizing the entire resources of a nation for war purposes. So long as sea power is unequally distributed among nations, there is but little prospect of a settlement of this problem by international agreement. The only certain way of regulating the freedom of the seas in the interest of neutrals in time of war

would be by replacing national sea power by international sea power, and that involves the question of disarmament and international police, which looks to the prevention of war rather than the freedom of the seas in time of war, and therefore is outside the scope of the present discussion.

In the present war, in addition to the familiar questions affecting the freedom of the seas arising from the law of blockade and of contraband, involving the right of seizure and incidentally the right of visit and search, and interference with the mails, the rules laid down in the Declaration of Paris and the establishment of war zones, the United States has also been concerned with the novel questions arising from the use of submarines as commerce destroyers, and the special regulations for immunity from seizure and condemnation adopted in the treaties of 1795 and 1799, as revived by the treaty of 1828 between the United States and Prussia, the obligations of which have since been accepted as binding upon the German Empire.

Apart from the laws invoked against the use of submarines as commerce destroyers, none of these laws and regulations is, strictly speaking, based on fundamental principles, but in each case they represent a compromise between neutral and belligerent interests as sanctioned by international custom and agreement. The inevitable conflict between the interests of neutrals and belligerents necessarily leads to differences of opinion as to their respective rights under these laws and regulations, and the rights of each class are unceasingly threatened with encroachment and impairment by the extension of the rights claimed by the other.

In so far as this conflict of interest is confined merely to differences of opinion as to the meaning of recognized laws and the interpretation of treaty stipulations, and so long as the conduct of belligerents is admitted to be controlled by the obligations of international law and agreements, the questions of difference can readily be dealt with by the usual methods of diplomatic discussion and international investigation and arbitration.

In accordance with the traditional policy of the United States, and by virtue of its general and special arbitration treaties, questions of a legal nature, which do not involve vital interests or national honor, and which cannot be settled by diplomacy, must be referred to arbitration; and by virtue of a series of treaties for the

advancement of peace, which practically all of the principal belligerents except the Central Powers entered into with the United States shortly after the outbreak of the present war, disputes arising between them of every nature whatsoever shall, when diplomatic methods of adjustment have failed, be submitted for investigation and report to a permanent international commission, postponing the commencement of hostilities meanwhile for at least a year.

So far as these questions are concerned, therefore, the obligation of the United States as the defender of international right was clearly defined and could easily be fulfilled.

Unfortunately, however, the interference with neutral rights on the high seas has not been confined in all cases to the mere question of the adjustment, within legal limitations, of the conflicting interests of belligerents and neutrals. There have been frequent occasions when the limitations of international law and the obligation of treaties have been deliberately and admittedly disregarded and violated.

Where these acts of lawlessness were no more than breaches of international good faith, even when they amounted to the violation of conventional or customary law, they might still be dealt with by diplomacy when pecuniary compensation would repair the resulting damages, or by the adoption of measures of retaliation or the imposition of such penalties as non-intercourse and loss of credit among reputable nations. But where these acts of lawlessness extended into the realm of barbarity violating the fundamental laws of humanity and civilization, what then was the obligation of the United States as the defender of international right?

Although, as above stated, the laws and regulations governing the respective rights of belligerents and neutrals in the freedom of the seas are founded on consent, rather than on principle, nevertheless, no rights can be admitted and no practices can be tolerated which are inconsistent with the principles of humanity and civilization, upon which all international law is founded, and this is a limitation which depends for its enforcement not upon any proceedings of international diplomacy or arbitration, but upon the force which humanity and civilization are prepared to exert for their own salvation.

The choice is between the preservation and the degradation of

American standards, and on that question, just as in this war, no American can remain neutral.

This brings up for consideration one specific point which I wish to discuss on the general subject of the obligation of the United States while a neutral in the present war as the defender of international right in relation to the freedom of the seas.

A pertinent question is the extent of our own responsibility for the failure of the belligerent nations to govern their conduct toward each other during this war in accordance with the requirements of international law. This is a question to which the American people, as neutrals, seem to have given but little thought.

Obviously we are not without responsibility for the conduct of the belligerent nations toward ourselves, and that is generally recognized, but it seems to have been lightly assumed that our neutrality did not require or permit us to concern ourselves with the treatment by belligerents of each other, or of other neutrals, and that the responsibility for determining whether or not the rights and obligations of international law should be observed rested primarily with the belligerent nations.

The question of what could or should have been done, more than has been done by our government, to compel the observance of international law by belligerents in their relations with each other and with ourselves and with other neutral nations, is a question of governmental policy involving political considerations and legislative and executive action which I do not feel called upon to discuss here. The point to which I wish to call attention is that every neutral nation, and especially the United States as a neutral nation in the present war, was not less, and perhaps even more, interested than the belligerents themselves in requiring that nations at war shall treat not merely neutral nations, but enemy nations as well, in accordance with the approved practices and usages of international law in time of war.

This doctrine of neutral responsibility was expounded by Senator Root in an address delivered by him at the annual meeting of the American Society of International Law in December, 1915, from which the following extract is taken:

> International laws violated with impunity must soon cease to exist, and every state has a direct interest in preventing those violations which, if permitted to continue, would destroy the law. Wherever in the world, the laws which should

protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breaking down of the law. Such a protest would not be an interference in the quarrels of others. It would be an assertion of the protesting nations' own right against the injury done to it by the destruction of the law upon which it relies for its peace and security. What would follow such a protest must in each case depend upon the protesting nation's own judgment as to policy, upon the feeling of its people and the wisdom of its governing body. Whatever it does, if it does anything, will be done not as a stranger to a dispute or as an intermediary in the affairs of others, but in its own right for the protection of its own interest.

Applying this doctrine to the freedom of the seas, the United States has been brought into contact at several points with lawlessness on the seas in this war in a way which from the beginning threatened serious consequences, and chiefly by reason of the German method of submarine warfare against commercial vessels. This policy was adopted avowedly as a measure of reprisal, and its justification has been attempted solely on that ground. It will be observed that this ground of justification would be wholly unnecessary if the retaliatory measure did not in itself violate the law.

I am not going into the law of reprisal further than to point out that it imposes certain limitations which must be insisted upon to give it the character of a law. It is sufficient to say that nowhere in our diplomatic correspondence with Germany on this subject has the German government denied the assertions in the notes of the United States that the German method of submarine warfare is contrary to the rules, practices and spirit of modern warfare, and a departure from the naval codes of all nations, including its own.

In denouncing Germany's retaliatory measures, the United States government did not base its objections on the technical ground that the war measures of the Allies did not furnish just cause for retaliation. The reason assigned was that the German measures of reprisal violated the requirements of international law. If they had not been illegal, or if, in spite of their illegality, they could have been justified by describing them as reprisals, our government would have had no legal ground for complaint. Neutrals on merchant ships of belligerents have no higher or different right to protection than enemy non-combatants on such ships. If, therefore, the methods employed by Germany for the destruction of non-combatants on enemy merchant vessels had not been pro-

hibited as unlawful even between belligerents, our government would have had to acquiesce in Germany's suggestion that American citizens be warned that they traveled on belligerent vessels at their own risk. The government of the United States took the comprehensive ground that by reason of the inherent unfitness of submarines for use as commerce destroyers, they could not be used for that purpose without violating not only the universally accepted rules of international law, but the underlying principles of humanity as well, and, therefore, refused to recognize any justification for such lawlessness in the guise of retaliatory measures. As stated in the American note to Germany of May 13, following the destruction of the *Lusitania:*

> the objection to their [Germany's] present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity, which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they cannot put a prize crew on board of her, they cannot sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats. These facts it is understood the imperial German government frankly admit. We are informed that in the instance of which we have spoken time enough for even that poor measure of safety was not given, and in at least two of the cases cited not so much as a warning was received. Manifestly submarines cannot be used against merchantmen, as the last few weeks have shown, without an inevitable violation of many sacred principles of justice and humanity.

In that statement of the law, the United States, although speaking only for American interests, made it clear that the destruction of enemy non-combatants on belligerent merchant ships was just as unlawful as the destruction of neutral passengers on those ships.

It thus appears that the destruction of American citizens on belligerent merchant ships in consequence of German submarine warfare against British commerce brought the United States face to face with serious responsibilities imposed upon it by reason of a violation of the obligations which international law imposes upon belligerents in their treatment of each other.

But this destruction of American lives was not the only evil consequence affecting the United States which grew out of this lawless method of attack by one belligerent upon another. Having

drawn the United States into contact with the conflicting interests of the belligerents, Germany promptly seized upon this situation as a favorable opportunity for imposing upon the United States the entire responsibility for its solution.

An examination of the diplomatic correspondence will show that Germany offered to abandon her submarine warfare against commerce if Great Britain would abandon her blockade.

It will be remembered that the United States disputed the validity of this blockade in some of its aspects, and demanded its abatement, but without success. Germany admitted frankly that the question of the observance or non-observance by the United States of this blockade was a question to be dealt with solely between the United States and Great Britain. This was distinctly stated in the German note of February 15, 1915, as follows:

> The German government have given due recognition to the fact that as a matter of form the exercise of rights and the toleration of wrong on the part of neutrals is limited by their pleasure alone and involves no formal breach of neutrality.

But, although as here admitted the German government was not justified in holding that the neutral nations in submitting to an interruption of their trade with Germany were unneutral or unfriendly, and although the rights of neutrals, and not the rights of Germany, were being interfered with, for the restrictions imposed by the law of blockade are imposed in the interest of neutrals and not of the blockaded enemy, nevertheless Germany proceeded to call the neutrals to account for acquiescing in the blockade and assigned this interruption of neutral trade with Germany as the justification for the German reprisals against the Allies.

In view of these considerations and of Germany's attitude toward neutrals in this controversy, it is evident that Germany's measures of reprisal were in effect reprisals against neutrals for acquiescing in Great Britain's interruption of neutral trade with Germany, although, as stated above, the German government itself has admitted that neutrals are under no obligation to engage in trade with Germany, and that they may acquiesce in its discontinuance without a breach of neutrality.

Yet the German government in its diplomatic correspondence with the United States has frequently asserted that its chief purpose in using submarines as commerce destroyers was to maintain the

freedom of the seas, and this assertion has been put forward ostensibly on the basis of protecting neutral rights.

Obviously Germany could not have expected that its ruthless submarine warfare against commerce, involving the destruction of neutral lives and property, would serve as an inducement to the neutrals to renew their trade with Germany.

Germany's real position was that if Great Britain was unwilling to agree to abandon the blockade, the United States could not object to Germany's measures of reprisal without first bringing effective pressure to bear upon Great Britain to abandon the blockade. In other words, that objections to illegal measures of reprisal could not be urged by a neutral government which had submitted to the alleged illegal acts in consequence of which the measures of reprisal were adopted.

The stoppage in our trade in war supplies for the Allies has been the chief purpose of German diplomacy in this country ever since the establishment of the British blockade shutting out all supplies from Germany, and that purpose has been their guiding star in their controversy with us about submarine warfare.

The plan was simple and adroit. If it could be made to appear that Great Britain's blockade was the responsible cause of Germany's submarine warfare, then, in order to settle that question, it might be possible to arouse the United States to resentment against the British blockade, which the United States had characterized as unlawful. It was anticipated that Great Britain would refuse to abandon the blockade, and it was hoped that a refusal by Great Britain to do this would result in the adoption by the United States of an embargo against the exportation of war munitions to the Allies, which was the result chiefly desired by Germany.

This plan failed, but the purpose underlying it persisted, and the outcome serves to show how easily and how deeply the rights of a neutral nation may be affected in consequence of the violation of the rules of international law by belligerents in their treatment of each other.

It will be remembered that the government of the United States refused to consider Germany's suggestion that submarine warfare on commerce should be contingent upon securing relief from British interference with neutral trade with Germany, and

that when this suggestion was renewed in the Sussex correspondence the final reply of the government of the United States was that:

it cannot for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other government affecting the rights of neutrals and non-combatants. Responsibility in such matters is single, not joint; absolute, not relative.

Germany made no reply at that time, and by reason of their inaction gained the credit for acquiescence. It now appears that they were waiting only because delay best suited their convenience. The German Chancellor said in March of last year that "when the most ruthless methods are considered as best calculated to lead to victory, then they must be employed," but they were not ready then—they were merely biding their time—and it was not until January of this year that they considered that the time had come. All this was frankly stated by the German Chancellor when on January 31, he officially announced that the moment for which they had been waiting to renew ruthless submarine warfare had at last arrived. He said:

Last autumn the time was not yet ripe, but today the moment has come when, with the greatest prospect of success, we can undertake this enterprise. We must, therefore, not wait any longer. Where has there been a change?

In the first place, the most important fact of all is that the number of our submarines has been very considerably increased as compared with last spring, and thereby a firm basis has been created for success.

And further:

The military situation, as a whole, permits us to accept all consequences which an unrestricted U-boat war may bring about, and as this U-boat war in all circumstances is the means to injure our enemies most grievously, it must be begun.

He seems to have made the German theory of the freedom of the seas sufficiently clear.

The usages and customs of war which have been worked out through centuries of development, and which at the beginning of the present war represented the enlightened thought of civilization as to what should be the rights and duties of belligerents toward each other and toward neutrals, seem to have been based for the most part on the theory that war is a game which must be played according to rules. Most of these rules have been wiped out by the vastness of the scale on which a war involving more than half

the world must be conducted, and by the destructiveness and frightfulness of the methods which have been introduced, producing an upheaval in the stability of things very like a tremendous process of nature which no man-made law can govern, and which is not amenable to the principles of morality or humanity. The only restraining influence is force against force.